

Montana Transportation Commission

June 26, 2008 Meeting

MDT Commission Room
Helena, MT

IN ATTENDANCE

Nancy Espy, Transportation Commissioner, Acting Chairman
D. Winterburn, Transportation Commissioner
Rick Griffith, Transportation Commissioner
Kevin Howlett – Transportation Commissioner
Barb Skelton - Transportation Commissioner
Jim Lynch, MDT Director
Jim Currie, MDT Deputy Director
Loran Frazier, MDT Engineering
Tim Reardon, MDT Chief Counsel
Lyle Manley, MDT Legal Division
Carol Grell Morris – MDT Legal Division
Lori Ryan, MDT
Charity Watt Levis, MDT
Mike Duman, FHWA
Kevin McLaury, FHWA
Monica Tranell
Jerry LaChere
Paul Dennehy, Lamar Outdoor Advertising

Please note: the complete recorded minutes are available for review on the commission's website at http://www.mdt.mt.gov/pubinvolve/trans_comm/meetings.shtml. You may request a compact disc (containing the audio files, agenda, and minutes) from the transportation secretary Lori Ryan at (406) 444-7200 or lravn@mt.gov. Alternative accessible formats of this document will be provided upon request. For additional information, please call (406) 444-7200. The TTY number is (406) 444-7696 or 1-800-335-7592.

OPENING – Commissioner Nancy Espy, Acting Chair

Commissioner Espy called the meeting to order. After the pledge of allegiance, Commissioner Howlett offered the invocation. Introductions were made.

Approval of Minutes of the May, 2008 Conference Call and the June, 2008 Conference Call.

Commissioner Espy presented the minutes from the May 5, 2008 Conference Call and the June 9, 2008 Conference Call. There were no additions, deletions, or changes made to the minutes.

Commissioner Howlett moved to adopt the minutes as presented. Commissioner Griffith seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

Agenda Item 1: Outdoor Advertising.

Testimony – Monica Tranell

I practice law in Whitehall with my husband, Jack Morris. I have not ever represented or appeared before the Transportation Commission before so your

procedure is new to me. I'll go ahead and present our argument in this case and if you have any questions, you can ask them according to your procedure.

To give you a little bit of background about this case, my client is Matt Wagner who owns some property just west of Whitehall at the first exit on the east side of Homestake Pass near Pipestone. His land is on the south side of the Interstate. He is a welder and travels around the state doing a lot of pipeline work. He also does a lot of work for Kevin Brunette, the trucking company, and the two of them decided to put a sign on that property that advertises Matt's Welding, which is a portable business and Kevin's Truck Repair. When the trucks come off the pass their brakes may be too hot and in need of repair, so the idea is they would go to that site right there and get repairs done either by Matt or whomever. I wanted to give you that background; obviously the purpose of our appeal has to be focused on the facts that were presented at the Hearing.

Our argument here today is that the Hearings Examiner erred in his Proposed Decision. The Hearings Examiner in his Proposed Decision found that the advertising on the sign that says "Matt's Portable Welding" is lawful because it advertises an activity that takes place on those premises, but the Hearings Examiner found the words that say "Whitehall Truck Repair" is not lawful because, in his opinion, that advertises activity that doesn't take place on those premises. Our argument here today is that finding was wrong.

I would like to give you references specifically to the record to the testimony that came in and to the Hearings Examiner's Findings. What I have from the Hearing is a CD so my citations are to the hour and to the minute to where those Findings took place. Under the statute 2-4-621 we have to show that the Findings of Fact should be overturned but the Commission in overturning the Hearings Examiner's Findings of Fact has to do a complete review of the record. In looking at the Conclusions of Law you can overturn those without doing a complete review of the record.

The issue, as we focus on it here today, is does Whitehall Truck Repair conduct activity on the premises at 326 Pipestone. That is the question. The evidence that came in at the Hearing shows there is no question about that – the answer is yes. The Hearings Examiner actually found that Whitehall Truck Repair does in fact conduct activities at 326 Pipestone. So if you'll go through the testimony that was presented at the hearing, Allen Hagadone is the employee and he initially ... essentially he drove by the sign and said that sign doesn't advertise activities that are taking place on the premises. He didn't conduct any investigation. He didn't call anybody. He didn't talk to anybody. He made no attempt to find out what actually takes place on those premises.

The testimony was that Allen Hagadone doesn't know when the words "Whitehall Truck Repair" were placed on the sign. I asked him "you simply assumed that the sign was illegal without conducting any investigation, didn't you?" And he said "correct." I asked him "did you do any investigation about whether or not Whitehall Truck Repair conducts activities on the premises?" He said "no I didn't." That is at 1:22. I asked him "don't you think it's necessary to ask proprietors of businesses whether or not they are conducting business on a premise before assuming the signs are illegal?" He said "maybe." I asked him "you wouldn't consider that a good investigative technique?" He said "it might have been." I asked him "you never did that in this case, did you?" He said "no I didn't." That's at 1:03. I asked him "you didn't have any information about whether or not Whitehall Trucking Repair conducts activities at that site, did you?" That's at 1:04. And he said "no I didn't." I asked him "you simply concluded it was an off-premise sign and then issued the Out of Compliance Notice, didn't you?" He said "yes." I asked him, "as you sit here today you have no facts that Whitehall Truck Repair doesn't conduct activities on the premises, do you?" And he said "no." That was his testimony. Pat Hurly also testified that he never did any investigation. He also said he never met Matt Wagner;

he'd never been to his property; he'd never even been to the place where the sign was located. He didn't do any investigation. So those were the two witnesses who testified on behalf of the Department.

We called two witnesses: Kevin Brunette and Matt Wagner. Although we don't have the burden of proof, it's the Department's position that the sign is illegal, it's the Department's burden to go forward to say the sign is illegal because of one, two, three. The testimony alone said that they have no idea what activities are conducted on those premises. So I called Matt Wagner and Kevin Brunette to testify and they both said that they conduct activities there. When the trucks come down off the pass, they often need a truck repair and they will pull in there and get work done. That is undisputed. The Hearings Examiner actually found that Whitehall Truck Repair conducts activities at 326 Pipestone. If you look at the Order on page 2 you'll see the Hearings Examiner found that in fact Whitehall Truck Repair does conduct activity there. The Hearings Examiner found that Allen Hagadone didn't ask whether Whitehall Truck Repair conducts activities. So although the Department itself had done no investigation, had no idea what activities were being conducted there when they found the sign out of compliance, we came forward with our own testimony that said here is what happens on these premises.

The Hearings Examiner, on page 6 of the Order, found two things. He found that Allen Hagadone "does not know and did not attempt to contact Kevin Burnett. He did not ask Mr. Wagner whether Whitehall Truck Repair conducts activities on Mr. Wagner's property at 326 Pipestone Road." The second finding on page 6 is "Mr. Hurley did not personally visit Mr. Wagner's property and did not meet with Mr. Wagner or Mr. Burnett. He did not know what activities Whitehall Truck Repair conducts on Mr. Wagner's land." He did not know what activities Whitehall Truck Repair conducts on Mr. Wagner's land and yet they issued an Out of Compliance Notice.

So our argument here today is that, given the testimony and given the Hearings Examiner's Findings of Fact, it is not possible to conclude that Whitehall Truck Repair doesn't conduct activity there. The Hearings Examiner found that the testimony established that there is no basis for concluding that the words "Whitehall Truck Repair" advertise activity that is off premise – it's on premise. The Hearings Examiner said that. The testimony established that. So our argument is that the Findings of Fact should be modified, should be rejected, and that a Finding should be entered saying "Whitehall Truck Repair conducts activities on these premises and the sign is an on-premise sign." Just as a sticking point or a nuance, as an on-premise sign they are not required to be permitted, so technically our appeal today isn't a permit revocation – on-premise signs aren't required to be permitted in the first place so there is no permit required for Mr. Wagner or Mr. Burnett.

I'm sure you have all the materials in front of you. We set forth our argument at length with citations to the record and to the law, so I won't repeat that here today unless you want me to. Essentially that is our argument in a nutshell – the activity that takes place at 326 Pipestone Road is repair of trucks by Whitehall Truck Repair and welding by Matt's Mobil Welding. And the degree and extent that those two activities take place was something that nobody asked about. Nobody asked how many times you do this. That came out at Hearing a little bit when we put Kevin Burnett on to testify and the Hearings Examiner asked how often he actually looked at and repaired these trucks. And Kevin said occasionally. That was the basis for the Hearings Examiner's Findings – that those words are advertising activity that is illegal. He said it doesn't happen often enough. Well, what's the threshold? What's the standard? How are we supposed to know how often is often enough? If he goes out there five times a month, is that enough? Is twice a month sufficient? So we're sort of scratching our heads asking: What's the standard? What's the role of the State when they come and say "your sign is out of compliance" and they don't talk to anybody, they don't do any investigation and then say "well, you do conduct activity

there but it's not enough." Is that the kind of Order that you want the citizens of Montana to read? They have no guidance as to what is enough activity to be an on-premise sign. There is no question that both activities are being conducted there.

The issue about the legality of the Administrative Rule. There is a question in the Department's governing statutes – there is no definition of an on-premise sign; the Administrative Rule does address what is an on-premise sign and defines it. In the briefs, the Department argued that we never raised the question of whether or not the rule was illegal before the Hearings Examiner and that's simply not true. We did raise that in our Closing Argument and if you listen to the record, the Hearing transcript at 3:08, that argument was presented to the Hearings Examiner. Whether or not the Administrative Rule goes beyond the scope of the statute wasn't addressed in the Final Order. In any case the Administrative Rule talks about what an on-premise sign is and talks about activities conducted on premises. The relevant portion of the rule says "on-premise signs means signs erected on property for the sole purpose of advertising its sale or release of or of advertising an activity on the property." So according to the Administrative Rule an on-premise sign is a sign that advertises an activity conducted on the property. In my research of Montana law I didn't find any decisions from the Montana Supreme Court saying what an on-premise activity is – is there a certain level of activity that has to be met in order to qualify. There is no decision saying that. For the first time at the Hearing the question came up about whether or not the activity was incidental and therefore wouldn't qualify. That argument had never been raised by the Department. We sent a question to the Department asking "what is the legal basis for your position that this sign is out of compliance?" And the Department said "here are the rules" and gave us three or four citations. We looked at each one of those and we prepared for the Hearing and came to the Hearing and said "this is an on-premise sign; its advertising activities conducted on the premises." For the first time at the Hearing, more than half way through the Hearing, the question came up "well these are just incidental activities." My clients, Matt and Kevin, are asking "ok well can the State just come by and say that's illegal take it down without any basis or justification?" Isn't there some obligation to call them and talk to them about it and ask what is being done there? That just seems like good manners if nothing else. But I think the legal obligation of the Department is to do more than what it did in this case.

I can stop there. I think that is the essence of our argument. If you have any questions I'll be happy to address them.

Com Winterburn: Is Matt's Portable Welding was at Exit 249?

Monica Tranell: By nature it is a portable business.

Com Winterburn: Is that where his house, his building, his trailer is? Is it at Exit 249?

Monica Tranell: Yes you take the exit off the Interstate and his property is just to the east and the south of the Interstate.

Com Winterburn: Whitehall Truck Repair, what address do they give as their operating address.

Monica Tranell: Their main business is in Whitehall. That's their main business.

Com Winterburn: So they are actually not located at Exit 249, they are located in Whitehall?

Monica Tranell: Right, they have a main business with a shop but again as a trucking business, they are also by their nature, mobile.

- Com Winterburn: I guess what I'm driving at is that is not where their actual on-premise business is though?
- Monica Tranell: Yes. There is a main business in Whitehall where they conduct activities. There is no question about that. Then they do repairs on trucks where the trucks are. They do repairs on trucks at 326 Pipestone.
- Com Winterburn: I guess what I'm seeing in the record is that Matt's Portable Welding which is on premise at that place where that trailer is seems to be in compliance. But the fact that Whitehall Truck Repair that is not their actual address, perhaps makes them out of compliance.
- Monica Tranell: I can understand that argument, but I think what you have to look at is what the rules say, what does the law say. It says "an on-premise sign advertises activities conducted at that site." It doesn't say "where your main business address is."
- Com Winterburn: For instance I own a ranch, I have a horse shoer that comes to that ranch, does he have a right to advertise on my ranch for his horse shoeing even through he may be there once a week?
- Monica Tranell: If he's there once a week and you guys enter into an agreement and if he is ... and this is a question of law and fact. If you take those facts and this guy does horse shoeing on your property, and anybody who happens to be riding a horse by who needs to be shoed can stop and he will come and shoe it there, and he wants to advertise, then yes.
- Com Winterburn: So we would actually be in business together?
- Com Espy: We are entering into an area that has no relation to this proceeding.
- Com Winterburn: I just wanted to see if these people were in business together?
- Com Griffith: Does the address 326 Pipestone have a Whitehall zip?
- Monica Tranell: Yes, 59759. It is in Jefferson County.

That is our argument I'm willing to address any questions that you have.

Testimony – Carol Grell Morris

My name is Carol Grell Morris, I'm the staff attorney for MDT and I represented the Department in this case and at the Hearing. I think we should start at the beginning which the previous presentation conveniently skipped. The beginning – the case started actually in January of 2006. You didn't hear about those facts in the previous presentation. At that time Outdoor Advertising staff person, Allen Hagadone, was contacted by a person named Kevin inquiring about putting a sign along I-90 near Pipestone. So in that phone conversation Allen explained that if you are going to do off-premise advertising, you have to have a permit and the location of those permitted sign is limited; the statutes limit where you can put those. So that was the end of that conversation. A few days later a different person contacted Allen and that was Matt Wagner. All of this, of course, is in Allen's contacted log which is part of the Exhibits that you have; it was introduced at the Hearing. So that is why we know the dates those things happened and Allen recounts his conversations in that

log. So he was contacted by Matt Wager a couple of days later, who was also in Pipestone, with the same questions – what about an off-premise advertising permit on my property. So here's the part we didn't hear about earlier, Allen went to that property. He drove down to Pipestone and met with Matt Wagner on January 26, 2006, because he needed to look at the location. He can't answer that question about qualifying areas until he goes there. So he drove down there and met with Matt – he actually met with Matt and they drove the property.

So what he discovered when he went down there was not only was Matt Wagner's property adjacent to the Interstate, it was also adjacent to an exit. That has a lot of significance because under your statutes, at 75-15-113, MCA, it states that no permit can be issued for outdoor advertising that will be located within 500 feet of an intersection. So that's why the proximity of the intersection became important. So Allen measured that distance. He wanted to be sure whether or not this property was going to qualify. They've got GPS measuring devices in their cars so he is able to do a very exact measurement. From the intersection 500 feet, that's the statute. He discovered that Matt's property was entirely within the 500 feet. The farthest border of Matt's property was still less than the 500 foot requirement. So the property itself actually did not qualify for an off-premise advertising permit. So Allen explained all that to Matt and he documents that in his contact log and he followed up with a letter – we can't give you a permit because the statute says your property is within the 500 feet. There is no place on your property that's going to qualify because of the 500 feet. That was all explained to Matt. We got the impression earlier that OAC had no contact with these people; that they just showed up or drove by or sent letters and that's not true at all. They went and met with Matt, they talked with him, they explained it all, and they followed up.

So Allen talked with Matt on January 26th and said "I'm sorry your property doesn't qualify for off premise, but you can put an on-premise sign here; the permit requirements don't apply to on-premise signs. So if you want to advertise your business on this premises, go ahead. That's not a permit we have to issue." So they heard nothing further from Matt Wagner. At the time Allen was there, there was no advertising on the property whatsoever. So he met with him in January and heard nothing. Nine months later Allen is going by the property and he discovers a semi-truck trailer is now parked on Matt's property. This is the first time Allen has seen it. Certainly he wasn't contacted before it was put up, so he's interested in what it says because on that sign it says "Matt's Portable Welding" which is Matt Wagner's business, but now it also says "Whitehall Truck Repair." Whitehall Truck Repair is not located on those premises. Allen actually knew that; he knew that there was a business named "Whitehall Truck Repair" approximately seven or eight miles further away down the Interstate at a different address. He actually already knew that. So all this talk about why he didn't contact them and this and that – he actually had talked with Matt, he had the knowledge of the locations, and he knows the law that that area can't have a permit for off-premise advertising.

So Allen wrote a letter to Matt Wagner and said your Matt's Portable Welding advertising is fine. That can stay; it's on premise. But the part that says "Whitehall Truck Repair" is unlawful and we'd ask you remove that and he gave him the appropriate citations and statutes, and said he'd measured the distance, and he recounted the whole situation for him. But Matt Wagner didn't remove the unlawful advertising. He responded with a letter with some information that he didn't think this truck trailer was a sign and he also stated in his letter, which again is part of the Exhibits that were introduced to the Hearings Examiner, he says in that letter that he can park the trailer anywhere he wanted. But he didn't say he was going to take the unlawful advertising off there. So OAC again tried to work with him and sent him additional information with citations, with rules, and this time they included an FHWA Memo because Matt had complained that this wasn't a sign. So Allen provided him the Memo that says "if a truck trailer is parked along the Interstate with advertising on it that is visible to the traveling public, it becomes a sign." So he sent

all that information to Matt and he still didn't remove the unlawful advertising. Instead he requested a Hearing.

I also wanted to provide these to you, I know you have copies of these in your Findings of Fact and Conclusions of Law exhibits, but they are photocopies and are a little hard to see. So these were a part of the Exhibits introduced at the Hearing, and there are two pictures that show the signs we are talking about. These are the same photos that were introduced at the Hearing. Let's look at these photos. You see the dates on these photos. Allen testified that he took these photos on October 23, 2006, and it is in fact a tractor trailer that you see there. On the first photo you see the words "Whitehall Truck Repair" with a phone number. We see "Matt's Portable Welding" with a phone number. I would note they are different phone numbers so obviously meant to call two different businesses. It's the next picture that is particularly interesting – this is the picture that appears to have the traffic bound in a certain direction and it says "Whitehall Truck Repair next Exit 249" and then the phone number. It also says "Matt's Portable Welding" with a different phone number. So the Commissioner with the earlier question about which Exit was on the right track. This particular piece of property Matt owns and runs his business out of is located on Exit 241 as I recall. So in order to get to Whitehall Truck Repair, according to his sign, you have to travel approximately eight miles further to Exit 249.

So in the previous presentation we had heard some testimony that the proprietor of Whitehall Truck Repair is named Kevin Burnett. He testified that he does activity there and he testified that he is there with great regularity, etc. Well what you're not hearing is his testimony over and over again that in fact his business is located at a different address. That was asked of him time and time again "what's the address of your business?" and he gave a different address than Matt's Portable Welding address. So he's acknowledging that his business is in fact located elsewhere. He was also asked "what happens when we call that phone number? Where does that ring?" That rings eight miles away at his business Whitehall Truck Repair. So that was part of the testimony also. The proprietor acknowledged that his business is not located there.

So we had an Administrative Hearing held on March 18, 2008, before Hearings Examiner Thomas Bowe. Now Mr. Bowe is an attorney with the Department of Justice Legal Services. He listened to all the testimony; not just the pieces you heard earlier and in fact not my pieces, he listened to all the testimony, all of the witnesses, and examined all the Exhibits, and you have them in front of you and these photos are a part of it, and also the Exhibits that Matt Wagner's attorney introduced. So he had all of that in front of him and he is an attorney so he read through the statutes and rules and was able to examine all of those. After reviewing all that evidence, he concluded that the truck trailer, owned by Mr. Wagner parked on that property, is an unlawful outdoor advertising sign to the extent that it displays anything other than Matt's Portable Welding. He also stated, if you look at his Proposed Order, that Mr. Wagner must remove that unlawful advertising; that is the portion that says "Whitehall Truck Repair" within the time set by the Commission.

So that's kind of the background and history of it. I did want to point out in response to the previous presentation some of the statutes and rules. The Hearings Examiner cited the law. If you want to know the pertinent statutes and rules, look at his Findings of Fact and Conclusions of Law and Proposed Order; he has them all in there. I'll just pick out the ones we talked about earlier today:

Montana Code 75-15-113 states "a sign may not be located on an Interstate Highway or Freeway within 500 feet of an Interchange." Again that is the reason the property doesn't qualify for a permitted off-premise sign. Montana Administrative Rule 1.6.202 defines advertising device "it includes any device used to advertise and being visible from the Interstate." So certainly this truck trailer qualifies.

The key rule, at least the key according to our previous presentation was 18.6.202(11) the definition of on-premise advertising. The earlier presentation made much of a portion of that definition. You were not being told the entire definition and you were not, in fact, being told the part the Hearings Officer relied on. He has that entire rule on page 10 of his Findings of Fact and Conclusions of Law. He reprints the entire subsection, not just the one sentence that you heard earlier today. And what he ends up concluding, on page 11 of his Conclusions of Law, is that there is a sentence in that rule which states “the purpose of the advertising sign” and again this is an on-premise sign, “must be the identification of the establishment or activity located on the premises or its products or its services.” And he concludes, based on that definition, Mr. Burnett’s truck repair activity is not located on Mr. Wagner’s premises merely because he repairs trucks in the open on Mr. Wagner’s land on an irregular and variable frequency from twice a week to once in three weeks.” So that is the key conclusion right there. That was based on all the evidence, all the testimony, all the exhibits.

So our earlier presentation that you should have looked at activity levels – that is a Red Herring; do not fall for that. In fact, the rule itself defines on premise and clearly states the establishment or activity must be located on the premises. And your analogy about a person who comes to a ranch for a horseshoeing is right on point. There are many different service people that might come to a business location, but that does not make them located on that premises. That is the exact situation we have here. In fact, looking at our photos again, it occurred to both the Hearings Examiner and the Outdoor Advertising folks to ask why is it necessary to write “next Exit” if this truck repair business was located here. Clearly they intended you to drive somewhere else for that business.

I just want to address the fact that the earlier presentation talked about failure to investigate and that was brought up at the Hearing as well. As you heard from the little portion that was quoted about questions that were put to the Outdoor Advertising people. That was a portion of the Cross Examination. That’s a tiny little portion of the testimony; it doesn’t encompass all the testimony given by that witness. The Counsel has argued both in her Exceptions and today, that MDT didn’t do any research, didn’t conduct any investigation. The impression is that MDT should have contacted some other unknown people or spent additional time looking at records. It’s not really clear what further investigation would have resulted in a different conclusion. OAC had already visited the site in January, had already determined the site didn’t qualify for an off-premise advertising permit, had already explained that conclusion to Mr. Wagner. Why was it necessary to go over the same ground again once the off-premise advertising was observed there? The sign itself very clearly indicates that Whitehall Truck Repair is located at the next Exit. A separate telephone number is necessary. So even if the Outdoor Advertising person had not been familiar with the location of Whitehall Truck Repair, the wording of the sign itself tells us it is not located on that premises. So no further investigation was necessary. All the pertinent facts had already been determined by Outdoor Advertising personnel and they had notified Matt Wagner by letter that the property didn’t qualify for a permit or off-premise advertising, the wording “Whitehall Truck Repair” was what made the sign unlawful.

We’ve already addressed the question about Matt’s original argument that this wasn’t a sign. The Hearings Examiner also did not agree with that and addressed that in his Findings of Fact and Conclusions of Law and Proposed Order.

I took some notes while Ms. Tranell was speaking and I want to set straight some of the argument made during that presentation. Ms. Tranell wants you to frame the issues as “what level of activity is conducted on the site?” That’s not the issue; that’s Ms. Tranell’s spin on the issue. The issue is “does the business Whitehall Truck

Repair meet the definition of on-premise advertising?” The Hearings Examiner found that it did not.

Again I would point you to page 11 of the Hearings Examiner’s Findings of Fact, Conclusions of Law and Proposed Order. Ms. Tranell had you looking at earlier pages where he is recounting testimony. Well I agree that testimony was given but the Conclusion of Law is the key – what is done with that testimony about activity conducted on there. And the key Conclusion of Law, page 11 starting at line 13, and we’ve already talked about this – “the words ‘next exit’ show the sign is not for an establishment located on the premises. The fact that Mr. Burnett occasionally repairs trucks on the property does not satisfy the ordinary meaning of the rules.” That was the Conclusion of Law the Hearings Examiner reached; not some kind of analysis of levels of activity. We don’t need that and we didn’t use that and that is not what the rule requires.

In conclusion I will say that the Hearings Examiner, Thomas Bowe, had already heard all the testimony and considered all the evidence in this case. He reviewed and cited all the relevant statutes and rules that are in your materials. He wrote specific Findings of Fact with citations to the record. He wrote specific Conclusion of Law with citations to the rules and statutes. And all of that work resulted in his Proposed Order that states “the trailer, owned and registered by Mr. Wagner and parked on his property near milepost 241.9 of I-90, is an unlawful outdoor advertising sign to the extent it displays information other than Matt’s Portable Welding and the phone number.” Again Hearings Examiner’s conclusion “Mr. Wagner must remove the unlawful outdoor advertising within the time period set by the Transportation Commission.” So I tell you today that Mr. Wagner’s Counsel has not presented any argument, in written Exceptions or in Oral Argument today, that would require you to reject or modify the Hearings Examiner’s Findings of Fact and Conclusions of Law. I urge you to adopt the Hearings Examiner’s Findings of Fact, Conclusions of Law and Proposed Order in its entirety as the Commission’s Final Order. Thank you for your attention and I’m available for questions.

Mr. Griffith: What is the meaning of “ordinary”?

Ms. Morris: Well I think you’re referring to the Hearings Examiner’s analysis of how you were supposed to construe statutes and rules?

Mr. Griffith: Yes.

Ms. Morris: He says in his Conclusions of Law that statute and rules are construed the same and they are construed by Supreme Court cases in their ordinary meaning. The Supreme Court sometimes uses “dictionary” and sometimes uses “common knowledge” of what an ordinary meaning is. The Hearings Examiner

Mr. Griffith: What’s common practice in Montana? What’s an ordinary practice?

Ms. Morris: The ordinary practice for on premise?

Mr. Griffith: Well any business. I’m confused with it being so undefined.

Ms. Morris: Ok, is it on premise definition that you think is undefined?

Mr. Griffith: The presentation you just concluded that it didn’t meet the ordinary test. I don’t know what the means.

Ms. Morris: Let me try and re-explain that. We have a definition of on-premise advertising in the Administrative Rules. The Commission adopted those rules and they have been in place for 36 years. So that

definition of on-premise advertising has been used in Montana for 36 years. During that time Montana Outdoor Advertising Control has always used the meaning to say “the business must be located on the premises” because that wording is in the rule definition and that is the ordinary meaning of it – located on the premises.

Rebuttal – Ms. Tranell

I grew up in eastern Montana and I don’t often get accused of “spinning” things. I would like to just make this pretty concrete and simple. Matt and Kevin are both business owners in Whitehall. They are not sophisticated, they don’t have college educations; they are pretty run-of-the-mill Montanans. Why is Matt’s business an on-premise activity? It’s a portable welding business. He takes his generator and he welds. He does welding; he works on pipelines, he’s not even in Whitehall that much in spite of the fact that he has a wife and three kids. Why is his activity an on-premise activity and Kevin’s isn’t? Is there any evidence before you about the levels of those activities? This isn’t a Red Herring, this is the issue. This is the issue. And the “spin” that I’m accused of is saying the activity level is the question before you.

The Department frames the question as “does Whitehall Truck Repair meet the definition of an on-premise sign?” Well read the statute and read the rule. The language doesn’t say “where is your office located? What’s your address?” That is not what it says. It says “are these activities conducted at this site?” If the answer to that is yes, which the Hearings Examiner said it was, then it is an on-premise sign.

So in making your decision I would just urge you to keep in mind who you are affecting by the decision. You affecting these people in Whitehall who said we conduct activities on these premises, and they do. That was the testimony. Everybody agrees about that. The Hearings Examiner agreed to that. So why is the sign an off-premise sign? If you do uphold the Hearings Examiner’s decision then it is necessary for you to make some delineation about what activity levels satisfy the criteria so the people will know. Because if the guy who puts shoes on horses is doing business on your property and anybody can come there and get their horse shoed and it’s ok with you if he puts up a sign there, why is that not an on-premise sign? That needs to be explained.

So I’ll just leave it at that – this isn’t complicated. I appreciate your time and attention today. Thank you.

Rebuttal – Ms. Grell Morris

In response those rebuttal statements. Monica asked if Matt’s business is portable, how can it be located there. Because in testimony Matt stated that he owns this property, owns the buildings on it, and runs his business out of that property. Monica stated where the office is located is not part of this. The answer to that, it doesn’t ask for the office and doesn’t need to; it asks for the establishment located on the premises. Monica states we need to redefine the activity level of the rule. The answer, no you don’t. The language of the rule already states sufficiently the establishment and identification of the business establishment located on the premises. It’s already states that; that’s sufficient. Thank you.

Discussion

Commissioner Espy said they would like to study the file before deciding on this matter but would have an answer before the Commission meeting ends.

Commissioner Howlett said he was somewhat troubled about perception; that there is some sense of arrogance or cavalier attitude that the Department might have approached this case with. I don’t know that to be fact but it’s something I think at least needs to have some light shed on it. We need to be perceived as an agency that

really tries to work with and cooperate with the people that we serve in the State. I just want the record to reflect that – those kinds of statements about the accusations of the Department staff being arrogant or cavalier in how they approach the citizenry of the state are troubling to me. I don't know these gentlemen individually, but certainly there is a perception out there, because it's been presented to us that that might have been the case. I just want to reflect that we are not necessarily nice guys, but we are not necessarily bullies; we have to follow the rules and the law and I think there is a way to do that without people becoming disenfranchised with what we might be trying to do for the general good of the State.

Commissioner Winterburn said that she also had that same feeling and I thought that, in looking at the letter from Allen Hagadone to Matt Wagner “the Department may enter upon lands bearing outdoor advertising to make examination of the advertising.” Then he goes through what is lawful “the Department shall give notice in writing either by certified mail or personal service to the owner and the occupant of the land on which advertising is believed to be unlawful.” Number 3 “if a Hearing before the Commission is not requested or if there is not an appeal from the Commission's Decision on the Hearing or if the Commission's Decision is confirmed on appeal, the Department shall immediately remove or cause to be removed the unlawful advertising and the Outdoor Advertising Department may, upon final determination by the Commission that an item of outdoor advertising is unlawful, enter upon lands bearing such advertising and remove the unlawful advertising.” I think that is what offended this young man – he was afraid we would be trespassing and he writes a letter to that affect right after this. This young man, Allen Hagadone, is in perfect right to say all these things; this is our legal obligation to say these things. But I think sometimes though if we would say “what you have done is correct if you take off the other half of the sign, you may leave what you've got in place” and not sound like it's an either or proposition here – either you take it off or we're coming on your land and we're taking this off for you. That is the perception that Kevin is concerned about and that we are concerned about, that we don't want to appear to be bullies in this situation, that compromise is possible, and that we are serving the citizens of Montana. I think that language is what caused this young man to call an attorney and be placed in a position where he felt that he was going to be trespassed upon, which is evidenced in the next letter. So I want to add that to the record.

Commissioner Griffith said I hear what you're saying and I read that and I also read that there is a property rights issue here. I tend to agree with Ms. Tranell in that she is right about it's either one or the other. Well I happen to think neither are on-premise signs. I drive by that sign at least twice a week and I think the Hearings Examiner could have been more strict about whether the other one is an on-premise sign. So I think there was some compromise by the Hearings Examiner saying that he truly has a lawful right to be there. But what were given a stead from Federal Highways to do and not only a stead, it's not just a good idea but it's worth \$24 million per year to not be penalized for not enforcing those kinds of things. We all know a way to get around the law. That's where my problem lies. At first that wasn't there, it was the other little sign that was there and then after the issue heated up, then all of a sudden comes the big trailer with the sign. I'm in agreement that we can't be perceived as bullies. I'm in 100% agreement that we need to protect the federal money and that we need to keep our highways clean and that by no way is this keeping our highways clean.

Commissioner Espy said she felt strongly that the Department has a Federal Regulation to meet in order to receive the monitory support for highways and consequently it's very likely that it may have seemed like an intrusion perhaps and not considering the feelings of the people involved. You can look at this two different ways but when you come right down to it we have a law and a regulation and we feel that it has been fairly judged by the people who have their specialty in this department and they followed the demands of the statute and the rules. That is the way I feel.

Commission Howlett said he didn't disagree with the Findings, it is the process or the attitude; again it's the perception that MDT is giving. I know in my years on this planet that MDT has at times been viewed by others as an agency that kind of does what it wants. We've worked hard to overcome that and we work hard on a daily basis to be an agency that serves the citizens. So again my feelings are not related to the Findings, my feelings are related to the perception about how the agency approached the issue.

Commissioner Espy said we've all known individuals from the Department that have stepped into an uncompromising position but they are usually are called back by their superiors. If not, as a citizen, it is my responsibility to call MDT and complain, which I certainly would. She asked the Commission if they felt they had discussed this enough and if they were ready to vote on the Findings.

Director Lynch said since two Commissioners brought, I too have a concern with the tone and the approach. Prior to this meeting I've discussed that with Legal and I can assure you that we are looking at ways for that to change. And it isn't just in this case, there are a couple of others and I too agree that we serve the citizens of the State of Montana, we don't rule them. Although we need to cite laws and rules and regulations that are established but in the same token we need to be less domineering in our approach.

Commissioner Griffith moved to adopt the Findings of Fact, Conclusion of Law and Proposed Order of the Hearings Examiner. Commissioner Winterburn seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

Tim Reardon – Outdoor Advertising Responsibilities

Tim Reardon gave a presentation on Outdoor Advertising responsibilities versus the Department. Earlier this month I celebrated 35 years in the practice of law and I never cease to be amazed at the ability of my profession to often escape the simple things. Just to prove the point, as I was listening to the arguments from the attorneys, I came across what the Legislature has passed into statute which is classified as the Maxims of Jurisprudence some of which go back to the 1800s but there is a couple that I thought would at least cause you to scratch your heads slightly. For example "Fraudulent Dispossession – a person who is fraudulently dispossessed himself of a thing may be treated as if the person still had possession." In 35 years of practice, I've never seen it cited in any case the Supreme Court has issued. "Apparent Nonexistence – that which does not appear to exist is to be regarded as if it did not exist." "Preference for Contemporaneity – Contemporaneous exposition is in general the best." So we have a knack, you might say.

The Chair asked me to give you a little background of responsibilities regarding outdoor advertising. The Commission's responsibilities in outdoor advertising fall in Title 75 of the Montana Code. The Title is called "Environmental Protection" and the chapter under which your responsibility falls is called "Landscape Management". That deals with outdoor advertising that will encompass and include billboards.

There is another subset of outdoor advertising that falls to the Department not the Commission. That is found in Title 60 which is the Department of Transportation. Where those programs sort of cross is that your jurisdiction in Title 75 is to regulate outdoor advertising on the Interstate and the Primaries; the Department's jurisdiction on regulating outdoor advertising is for specific purposes on the Interstate and the Primaries. The distinction is Department's jurisdiction or responsibilities on the

Interstate falls into what has come to be known as the “Logo Sign Program”. Actually Logo is a company and these are the blue signs you see usually at the interchanges that advertise food, lodging, gas, and what have you. Logo is a company that bid for that contract; that’s a franchised contract awarded about every 5-7 years. To the best of my knowledge Logo has been the only company that has ever won the bid. Over time it has simply become known at the “Logo Sign Program.” That’s an Interstate program. It is clearly advertising although it’s usually limited to advertising with an arrow that says “Exxon at this Exit” or you get to the bottom of the ramp and it will say “Exxon to the right and Cenex to the left” for options. On the Primary System we have another Department responsibility for advertising called the “TODS Program” which is an acronym for “Tourist Oriented Directional Signs”. Again these are the blue signs with the white letters and they advertise the same kinds of services – food, lodging, gas and what have you.

They are both advertising, obviously, but the advertising that you are going to deal with and that is your responsibility under Title 75 is different from the Logo and the TODS programs. Those were specifically established by the Legislature and given to the Department. As you take up the issues of outdoor advertising rules, your responsibility ultimately is the regulation. The Legislature has authorized you and in fact directed that you adopt rules to incorporate the program. And your rules need to model what the Federal law requires up to the point that you can be more restrictive; you can’t be less restrictive but you can be more and still be in compliance. It’s a little bit hard to understand the differences sometimes because there is co-mingled jurisdiction over the Interstate and the Primaries but the programs are the same. The Logo and the TODS programs belong to the Department, the Outdoor Advertising Program, such as you just heard this contested case – on-premise/off-premise, location to the interchange – all of those programs are rules adopted by the Commission.

Tim Reardon – Supreme Court Decision on Outdoor Advertising

There is one other piece of information that we can talk about when you take up the rule. This is informational and has to do with a Supreme Court Decision that is indirectly impacted because you are the Defendant. If you recall last fall there was a Hearing regarding a Permit Application by Lamar Outdoor Advertising in Yellowstone County. The Permit was denied, the Commission had a Hearing, the Hearings Examiner upheld the denial of the Permit and that was appealed to the Commission which upheld the denial of the permit. Lamar appealed that to the District Court in Yellowstone County. The District Court reversed that and ordered the Permit to be issued and awarded attorney’s fees and costs. That was appealed to the Supreme Court in January or February; the briefing schedule was completed in May. In any event, just so you know the Supreme Court upheld the District Court and has ordered that the Permit for the Sign Application in Yellowstone County be issued. There is still a few days left to request a re-hearing but you are the Defendant in this action – you lost that portion of the case. The Court has continued the jurisdiction over the issue of attorney’s fees and costs. The significance of that particular element is that in order to award those fees and costs, the court had to find that the conduct of the State was unreasonable. So the Supreme Court has said they will continue to consider that argument but they ordered that the Permit be given. I will share a copy of that Opinion with you. It directly relates to the pending adoption of the rule that you have before you today.

Director Lynch asked why it had to do with the Commission’s decision. Tim Reardon said if you recall when this all started two years ago we had the first rules proposal which had a regulatory function. It had sign location, sign size, number of messages, brightness, how long a message could be displayed, how long a sign would be dark and so forth. The Commission considered those rule and chose not to adopt

them; the consensus of the Commission was that it should be a legislative matter. And nothing took place after that except the permit applications that needed to be addressed. They had been denied and that spawned, if you will, the litigation because the Permits were denied. The argument was there were no regulations; there are no rules, which is pretty accurate – there are no rules regulating those signs (LED or digital or whatever the appropriate technological term is). So with the Supreme Court Opinion it simply affirms what the District Court found and that is you can't deny permits simply because you haven't adopted any rules yet. In 2007 the Legislature did not act, and the general feeling of this Commission at the time was that the Legislature would take up the issue. Well, they didn't.

So we're here today with this rule and you are in a state of limbo here because you have no rules regulating at all. So you're not regulating size, location, brightness or anything else. The Commission, as the entity responsible, has a responsibility with the Federal Government to somehow regulate outdoor advertising. And this particular element of outdoor advertising is now arguably unregulated. I can't tell you what the implications of that might be, but in order to meet our obligation with our partnership agreement with FHWA I believe the State has a responsibility to take some steps to regulate outdoor advertising. The Supreme Court and the District Court has said you don't have rules regulating "these" signs, which was a permit upgrade actually, so give them the Permit. So that is where you are.

The rule you are taking up later today is a rule that simply bans or prohibits these signs. If you adopt the rule, it prohibits LED or digital signs. Director Lynch asked if the Commission adopts that, then there would be a rule? Tim Reardon said yes there would be a rule. It is a state-by-state responsibility to regulate outdoor advertising. How you choose to do it is up to you; you just have to do something with it. It is the responsibility of the State to regulate in some fashion. In this particular instance there is a void. The argument could be made that the void is filled by simply granting permits but if you grant permits without regulating certain elements, you're sort of not regulating.

Commissioner Espy asked how it affected Federal Highway Funds. Tim Reardon said if you're not fulfilling your responsibilities to the feds by either regulations or an agreement then you may be subject to losing them. Director Lynch said he was still confused on the issue. Tim Reardon said prohibiting is regulating. Prohibiting has the same effect as regulating as far as FHWA is concerned. There are states that don't allow any billboard and they haven't lost their federal funding as a result of not allowing it; that's how they chose to regulate it. So that is a legitimate element here.

Regarding the court case, Commissioner Griffith asked if court case that moved up the chain, was an upgrade to an existing rule. Tim Reardon said it was his understanding that it was a modification to an existing sign. Commissioner Griffith said he was also confused. If we talk about a ban, we are passing the rules, we're banning upgrades is that what we'd be doing? Tim Reardon said you would be prohibiting the erection by way of upgrade to the signs of LED or digital billboards on the Primary and the Interstate system only. There are LEDs and digital signs in place in Montana; you don't regulate the Secondary Highways or the Reservations. There is one here in Helena.

I hate to bring you bad news that you lost the Supreme Court Case but it is the nature of the beast. Commissioner Griffith said it had an outside influence. Director Lynch said it showed the importance of asking you to modify the meaning ... we all operate under the understanding that they weren't allowed. If they are an electronic billboard, they weren't allowed but now the definition of electronic billboards has been challenged, and that is what's brought the rule modification. If anything it tells you why we have to do it; why we have to make that change. Commissioner Griffith said the ban says "no more, we aren't going to allow it" and that may be interpreted as saying we don't want it. But we allow billboards in this state but as a result of this

rule we don't have the ability to go back and ban billboards. Director Lynch said this proposed rule doesn't say you can't have billboards. If they meet the requirements they can still have billboards, they just can't have LED billboards. The rule is clarifying what the term "electronic variable message sign" means. Right now it means LED and all the other things. It doesn't prohibit another billboard like you have now.

Commissioner Winterburn asked if the people applied for Permit previous to the time the new amendment was set in place, when we didn't have a law against it. Director Lynch said we had a rule against it. Past Commissioners had a rule against it, but the interpretation of the District Court is different than the Commission's interpretation. That's why you're here today making that rule clear because the rule is unclear in the District Court's mind and now the Supreme Court's mind. Tim Reardon said a part of the confusion is that the federal law does have some regulatory functions of things not allowed in outdoor advertising – scrolling signs, movable messages, animation, automated stuff on any billboards is prohibited by federal regulation. All the states that allow outdoor advertising essentially have adopted those criteria either by statute or by Administrative Rule, as has Montana. What has evolved essentially is the technology improvement. As the federal government looked at their regulations that the states have copied, FHWA issued a Directive that said we will now consider digital or LED signs to fall within the ban, the prohibition of scrolling movable stuff. The same advisory listed some guidance – if you are going to allow these signs, then there has to be some constraints, i.e., location, brightness, and how many messages, twirling, dark. That simply means the face of the particular message is static for 5 to 10 seconds then there is a change to another message. If you want to get more confused, just drive up and down the streets of any city and see the on-premise signs that will just blast you with red, white, blue, green, yellow, sparklers because we don't regulate those; those are on-premise signs. It's a complicated area. But you have the onus on you to deal with it and part of the onus is to regulate. The rule that you have out there is the rule that would essentially add digital or LED boards to the prohibition along with scrolling, moveable, and so forth. That is what you are looking at.

At this time the Commission recessed for the Big Letting. The Commission reconvened 15 minutes later.

Sara Busey, Americas Visual Environment, joined the Commission meeting via telephone. It is scenic organization that has been in existence for 15 years out of Missoula. The Commission introduced themselves and those attending the meeting

Proposed Rule Amendment

Lyle Manley addressed the Commission regarding the procedures used for the Adoption of the Proposed Rule Amendment. I was asked to be the presiding officer of three Hearings that were held. I can't answer any technical questions but I can give you some overview about the procedure we used to get to this point. It is my understanding that the Department published the rule that we are considering today on March 27, 2008. That rule was published after this Commission gave its approval because it is this Commission that has the authority for adopting rules that regulate these types of signs. Pursuant to the publication of the proposed amendment; it's not a new rule, it is an amendment to an existing rule. Subsequent to the publication we had three Hearings – on April 21st we had a Hearing in Kalispell; April 22nd we had a Hearing in Missoula; and on April 28th we had a Hearing in Billings. At each of those Hearings there were between 20-30 people; there wasn't a vast amount of interest at least in terms of the people who showed up. We took public testimony; each Hearing took about one hour. There were people in favor and people against. That has been reduced to a transcript which is been provided to the Commission. After

those three Hearings, we kept the record open for people to make comments until May 5th. People made comments either by writing a letter or by sending an email, plus some people had handouts at the Hearings. We received something like 400 comments. So after May 5th Carol Grell Morris and I tried to reduce that so you didn't have to read them all although we can provide them to you if you want them. We've tried to summarize them into 33 areas that were fairly identical. For instance there might be 50 people who said they liked the rule or their might be 40 people who said they hated the rule. We didn't think you had to read all 90 of those to get a sense of what that was. So if you've read the Presiding Officer's Report which I produced as a result of that effort, you will know what I'm talking about.

Today we are here for the Commission to consider whether to adopt the Proposed Amendments or not. Unfortunately for you it is your duty to respond to the comments – all 33 of them. We are here to help with that. I can't tell you what to say but I'm here as a resource.

Commissioner Espy said the Commission would review the comments. Tim Reardon said this public involvement process has been pretty extensive: three Public Hearings as well as the information you received electronically and by letter, however, He suggested the Commission consider whether there is any new information – something that, for whatever reason, could not have been presented to you prior to May 5th. He felt it would be important to take that into account before making the final decision. Commissioner Griffith asked if he was suggesting that they leave this open for a period of time. Tim Reardon said no, but this is the only shot that people have for a one-on-one with the Commission. Everything up to this point has been done through the Hearings Officer, which is the statutory process. I guess it is an ounce of caution perhaps. If there is a study out there somewhere on these particular signs that would influence your opinion, you may want to continue it before you make a final decision. In all the years I've been with this Agency, this has been the most extensive public involvement process I've seen and the sheer volume of comments is the largest submittal I've seen. It indicates a lot of interest on both sides of the question.

Commissioner Espy asked if there was anyone with new information that they would like to present at this time. Commissioner Winterburn said the document states that the Federal Highway Administration will be doing a Safety Study on these billboards in 2009. Tim Reardon said that was his understanding. Commissioner Winterburn said there doesn't seem to be a real concrete study on safety. That study will come out in 2009 but it looks like it will be the first definitive study on safety regarding these signs.

Commissioner Espy said each Commissioner had received copies of the transcript and the arguments on both sides. The comments were relatively short and were almost a 50-50 brake on the issue. It was very interesting that there was more talk on what people would like or not like than what actually pertained to the rule before the Commission today. Commissioner Griffith said as he read through the volume of comments was struck that issue of technology was front and center on this. That's why I made the comment earlier asking whether we are talking about an upgrade here or about something entirely new. As I contemplate this I have a sense of this Supreme Court Decision looming. I don't know that a ban in its entirety is what I consider to be regulation. It just puts it off limits. Again knowing there were so many comments and they were somewhat evenly divided, I'm just wondering if we might give some consideration to an interim while we develop some regulations similar to some issues discussed when we chose not to deal with this some time ago. It seems to me that we are moving in that direction. I'm not inclined to support a full ban but I am inclined to have some very stringent regulations that give local governments and the appropriate governing bodies the authority that is now the Commissions. I don't know if this Commission has the ability to delegate that authority. I don't know if we adopt a total ban, that it won't surface again in the

Legislature. We all assumed the Legislature would take this up. I do continue to think that is the proper forum but nonetheless we, as an Agency, are tasked with that. I'm wondering where we find some middle ground. Where do we say these things can be permitted but under these very specific conditions and these very specific regulations that deal with density, brightness, and other things. I just think that the positions are extreme and there is common ground somewhere in the middle.

Commissioner Winterburn proposed the following summary statement:

At the time of this Hearing there is no law against LED or EBB on Montana statutes because the technology was so new and it's not addressed in the current laws, however, an amendment to the law is proposed to include EBB. At issue is whether these signs promote safety and aesthetics on the highways. That is from 75-15-102 MCA.

The Commission recognizes that beauty is in the eye of the beholder and that we cannot legislate on the basis of whether these signs will ruin the night sky or the beauty of the Montana country side.

We also recognize that no real studies have been done on the safety of these signs on either side of the argument. A complete study is scheduled to be done by Federal Highway Administration in 2009 and until that study is done we have no significant study on either side of this argument. The law does state that the driver should not be distracted for more than two seconds by outdoor advertising and the current study shows that, while the driver may only be distracted for two seconds by a variable imaging sign, it takes a minimum of five seconds to comprehend that message, according to the billboard industry itself. This seems to negate the safety standards of the Federal Highway Administration. Since there are no truly conducted studies on the safety issue of these signs, we should maintain the status quo and amend statute until further studies can be completed to insure the safety of our highways.

The overall message of these hearings was that there should be a compromise reached between complete denial of these signs and complete accordance for permitting them. People feel that their voices have not been heard; the hearings were not held throughout out the state; the issue has not been decided by referendum or a legislative procedure. I do not disagree with the latter. I have felt all along that in the absence of proof of harm and in the absence of a set of laws prohibiting these signs, the State and the advertising companies could be locked in a prolonged and expensive battle.

There are issues worth reviewing once it is proved that safety is not an issue. The duration of the message or dwell time, transition time, brightness, spacing, location, particularly not in animal crossings, narrow shoulders, difficult weather areas, interest to the public parks forests or monuments. Reasonable and safe standards to regulate these signs are in place for the protection of the motoring public and effective and efficient enforcement needs to be in place for these signs to be in compliance with the above legal considerations. Signs should be designated to zoned and unzoned commercial and industrial areas and messages, along with Federal guidelines, should have no movement, sound, animation, flashing, scrolling, or full motion video. These elements need study and they need policy.

In terms of what we read in these comments, small businesses were concerned they were not being allowed any off-premise advertising. This is another issue that is already accorded by law. The discussion here is for variable signs and it is a discussion about settings on the highway. I would like to know how often Montana issues an Amber Alert just because that seems to be a big play for

the industry that we need to have this Amber Alert and I don't know how often that really comes into play.

The Department of Transportation already provides information on safety conditions of the road; weather conditions, places to rest, eat, lodge, how far it is to the next stop for refueling, so the status quo does not need changing.

We should not proceed with this technology because it has "a clean look" or "it's cool" or "it's a good looking system" or "it communicates that we are in a state that appreciates technology," that's ridiculous. Those are all quotes from the industry. It is my opinion to amend the ARM Sections 18.6.02 and 8.6.232 until at least complete studies are done on safety as regards to electronic billboards in 2009 by the Federal Highways Administration and policy can be set on the nine issues that I stated above. I'm sure that the use of electronic billboards will continue on-site advertising in the future but I do not think they yet have a place on Montana highways.

Director Lynch asked if that was the motion. Commissioner Winterburn said that was her motion. Commissioner Winterburn seconded.

Tim Reardon said the Commission procedurally still has to develop responses to the comments that were received; that is a requirement. Those will be published in this book and they will be published one-by-one. The overall of the Report said that the supporters and those who oppose the rule didn't really address the specifics of the rule, they addressed the outcome – adopting or not adopting and why it should be adopted or not adopted. There is a lot of personal opinion, a lot of personal aesthetic evaluation on one side and then on the other side there are economic influences about advertising and the ability to advertise and the significance of being able to advertise for marketing purposes. Those are all interesting but I didn't see "this word in the rule is confusing" which is typically what you see when you have Administrative Rules out for public comment. You usually get somebody who says "is this going to apply to gravel pits that are smaller than two acres." So it makes it more difficult because you have to respond to comments which are more personal opinion than anything else. For example, Commissioner Winterburn talked about the issue of safety. I see in this report there some people say these are unsafe, they are dangerous and they cause crashes, and I see five pages later there is another comment that there is no evidence that they are unsafe and there are studies that say they are really not a distraction. My whole point is you still have to respond to the comments so they can be published.

Your choices are to adopt the rule, not adopt it, or you can modify it, but this is sort of an up or down rule. I don't know how you modify this along the lines that Commissioner of Howlett is suggesting; that to me would tend more toward a new rule. Director Lynch asked if they had to comment first before they adopt or can they adopt and then comment. Tim Reardon said the statute doesn't give a whole lot of guidance so I suspect you could do either. It seems to me it would make more sense to have your discussion about the comments.

At that time Commissioner Winterburn withdrew her motion. Commissioner Griffith said the Commission was in receipt of a review of the comments, is it your intent that we adopt the comments one at a time. Director Lynch asked if they could do a global comment or do they need to address them one at a time. Tim Reardon said that they should go through the comments one-by-one. For example in Lyle's Draft Report, Comment No. 1 "Twenty-six comments received expressing general support for prohibition of Electronic Billboards (EBBs) on state roads." The Commission can agree that they got 26 comments on it; I don't know how you respond to it other than you note that the comments were received. It doesn't give you much to respond to other than acknowledging the comment. You can certainly add to that. Comment No. 2 is about distraction for drivers, which is what

Commissioner Winterburn talked about. As I remember there is another comment that says they are not a distraction. There is obviously a division of opinion about whether or not they are a safety distraction. Having looked at the Administrative Register over time, you just comment the best you can. Director Lynch asked if they were to start on the first one and come up with a comment and the fourth one down is very similar to the first one, can they say “see comment no. 1”. Tim Reardon said yes, that happens quite regularly.

Commissioner Griffith said that he though Commissioner Winterburn expressed the comments in very elaborate discussion – she talked about safety, blight on the environment, the absence of studies, she talked about no new studies being in place at this point. I think that is a statement that I’m comfortable with that addresses these comments. I think the motion in its entirety or the motion to amend and the statement she prepared would, in my opinion, suffice for the comments. Commissioner Espy felt they wanted to hear us discuss them. We have controversy over some of them. Commissioner Griffith said he was comfortable going one-by-one.

The Commission discussed Comment No. 1. Commissioner Espy said the Commission’s response could be along these lines: “the Commission appreciates the comments. It should be noted that the Commission’s authority to control outdoor advertising only extends to the Interstate Highway and Primary Highways. The Proposed Amendments do not apply to state roads nor do the Proposed Amendments apply to Indian Reservations.”

Commissioner Griffith asked what they would do with the Interstate Highway going through the Crow Indian Reservation. Director Lynch said it was under their jurisdiction. Commissioner Griffith asked if the signs would be allowed on the Crow Indian Reservation. Director Lynch said yes if they choose.

Commissioner Winterburn said it was her understanding that the Indian Reservation has the choice; the Tribal Leaders have the authority. Commissioner Griffith asked if they had to establish rules too. Director Lynch said it was up to each individual Reservation how they deal with advertising. My understanding is the State could take steps to enforce and regulate on the Reservations but by Agreement, Federal Highways is agreeable by virtue of the Agreement between the State and the Tribe as governmental jurisdiction, that the Tribes, within the exterior boundaries, can regulate and control; but the State is not prohibited. In Montana the decision has been made not to regulate on the Reservations. Commissioner Howlett said on the Reservation that is my home, the land is checker boarded substantially with multiple jurisdictions. He asked who enforces in the absence of a Tribal Ordinance, does the Tribe enforce it? He noted that this is very complicated because I see these outdoor signs advertising off-premise stuff all over on Hwy 93. They are all over; they are popping up everywhere. Who’s controlling it? That’s a primary highway; Hwy 93 is a Primary Highway. Director Lynch said they were on the exterior boundaries of the Reservation and he said it would apply to all sides whether it is electronic or not electronic. The position of the State has been to recognize the sovereignty of the Reservations. Commissioner Howlett asked what happened if the Tribe was not in agreement with these signs, who is going to enforce that?

Commissioner Griffith stated it was an opportunity for both the Tribe and State to have an Agreement. Basically some formal Agreement about enforcement because the Tribe could enforce and would enforce an Ordinance on individually owned Indian property or allotted property; and all those properties have different statuses and different legal statuses; it is a complicated situation. I’m not comfortable just saying on Reservations it is good because if you look ... on the Flathead Reservation lots and lots of property along Hwy 93 is not owned by the Tribe and it’s ripe for abuse. If the State is on the Reservation and they have no control, then the Tribe is

going to suffer particularly if the Tribe is not in agreement with these signs going up. I think we need to be mindful of this in this deliberation.

Director Lynch asked if the state issues permits for signs in the American Reservations in the state. Tim Reardon said no we are not currently. Director Lynch said we've allowed the sovereignty of the Tribes to make the decisions for their Signed Ordinances. Now if they need our help and they want to use the existing laws of the State of Montana to be their rules and regulations, the State of Montana would be more than willing to help in that effort, but that has to be asked by them, the Tribal leaders. So if there is an issue within the Reservation, and the Reservation has made the legal decision not to have the signs there, then they would come to the Department of Transportation and ask us for our assistance in regulating and we would have to enter into some sort of Memorandum of Understanding. Carol Grell Morris said the State doesn't regulate on any Reservation. We would have to have an Agreement.

Commissioner Griffith said he was personally offended by the number and kinds of things that go up along the highway on the Flathead Reservation; that's my home. Most of those properties are not Tribal properties. I honestly don't know that there have been discussions between the governments about the Tribe's ability to ask the state to enforce. You've got the Interstate on Crow, you've got Hwy 93 on Flathead, you've got two on Belknap and Ft. Peck; those are major arteries. Commissioner Griffith asked why that can't be part of the comment that while the proposed amendment does not apply on Indian Reservations, the Department should try to be engaged in the promulgation of rules related to signage. Commissioner Howlett felt that was a reasonable request.

Commissions Response to Proponent's Comments

Comment No. 1: Twenty-six comments were received expressing general support for prohibition of Electronic Billboards (EBBs) on state roads.

Commission Response: The Commission appreciates the comments. It should be noted that the Commission's authority to control outdoor advertising only extends to the Interstate Highway and Primary Highways. The Proposed Amendments do not apply to state roads nor do the Proposed Amendments apply to Indian Reservations. While the proposed amendments do not apply on Indian Reservations, the Department should try to be engaged in the promulgation of rules related to signage.

Comment No. 2: Seventy-five comments were received stating EBBs would be a distraction for drivers and may cause accidents; therefore EBBs are a safety issue. Studies have shown that crashes are caused by distractions to drivers, and EBBs are designed to take a driver's attention from the road.

Commission Response: Based on the 75 comments that were received stating EBBs were a distraction for driver, the Commission recognizes that there are numerous studies that have been directed at the issue of safety related to the possible driver distractions caused by EBBs. However, the Commission also recognizes that there is no consensus in the studies as to whether there is a cause and effect relationship between EBBs and crashes. Certainly, there is nothing that approaches a scientific certainty on this issue.

Comment No. 3 Forty-one comments were received stating EBBs are a blight on the environment, mar the landscape, and would not be aesthetically pleasing and that Montana's scenery needs to be protected.

Commission Response: The Commission recognizes that there are differences of opinion on the environmental impacts of EBBs and some find them offensive. As can be seen from subsequent comments, certain individuals expressed the opinion

that the EBBs have a pleasing or "clean look."

Discussion: Commissioner Winterburn said this was not at issue because we have so much difficulty deciding what is pleasing to the eye. Although safety and aesthetics is the main statement of Montana law for billboards I don't know if we can decide who thinks what is pleasing. Some people think its "cool" and others think it is going to ruin the landscape. Some people talked about how there is 200 miles to look at nothing but grass so why not, some people loved looking at 200 miles of grass. So I don't think we can come to any conclusion on the aesthetics. Commissioner Griffith said plant a tree, not a billboard. Director Lynch said Commissioner Winterburn kind of covered it all; you can refer to her comment if you are going to adopt her comment. Commissioner Howlett said Commissioner Winterburn's comment would serve as a good summary of our comments when we get done with these. Commissioner Griffith said beauty is in the eye of the beholder.

Comment No. 4: Twenty-three comments were received stating EBBs will cause visual and light pollution and blemish the night skies.

Commission Response: See Response to Comment No. 3.

Discussion: Commissioner Espy said that you would have to have proof that would happen. In certain areas it might be a blemish and we would be concerned if the light was bright enough to distract anyone in driving.

Comment No. 5: Five comments were received stating EBBs will devalue surrounding property.

Discussion: Commissioner Espy said sporting people would say it would be beneficial to them if they were having a sporting event but it would not devalue the property and may help people to get to where they were going. But I doubt that the property would be devalued unless it was in western Montana because they are very concerned about the blight of just seeing one; it would bother them a great deal. Commissioner Howlett said if it were a plywood plant for instance, it would probably not devalue the property, but if it was \$500,000 houses, it might be an issue. Commissioner Winterburn said we have no information on whether it would or would not devalue property so we can't really respond to it at this point.

Commission Response: The Commission does not have any information that would either support or refute this assertion.

Comment No. 6: Eleven comments were received stating EBBs are ugly, garish and intrusive.

Discussion: Commissioner Griffith said that is really subjective; beauty is in the eye of the beholder.

Commission Response: See Response to Comment No. 3.

Comment No. 7: Three comments were received stating some small businesses who advertise on EBBs may experience revenue growth, but it is at the expense of other small businesses that are not advertising on an EBB. All affected businesses will end up engaged in an advertising war, which will result in the same number of customers for each, but at a higher private advertising cost. Small businesses claiming EBBs are necessary to prevent them going out of business will have difficulty proving this cause and effect relationship.

Discussion: Commissioner Griffith said the other advertising program gives people options ... (inaudible) ... Commissioner Winterburn said this is a capitalistic system and that's how business goes. That's always a discussion within business of how you

spend your advertising dollar and whether or not it will bring business back to you. This has nothing to do with whether you advertise on electronic billboards, magazine, or television; you have a choice to put your dollars wherever you want and see whether they pay off. Commissioner Espy agreed.

Commission Response: The Commission recognizes that advertising is a legitimate business concern, but the Commission has not been provided any hard data which supports or refutes the assertion.

Comment No. 8: Ten comments were received stating tourism will suffer if EBBs are allowed because Montana's scenery will be seriously affected in a negative way by EBBs.

Discussion: Commissioner Griffith said that went back to the comments made earlier about where the signs are located and the beauty is in the eye of the beholder. Commissioner Espy also felt there needed to be responsible rules and regulations.

Commission Response: See Response to Comment No. 3.

Comment No. 9: Five comments were received stating any rule authorizing EBBs throughout the state usurps local control, as even if town and county ordinances prohibit EBBs, they could still be erected on government and school property.

Discussion: Commissioner Espy said in our part of Montana, we've been very fearful of what has happened in South Dakota where they brought railroad right-of-way and put up huge, huge billboards. What was once a beautiful valley was just billboard after billboard advertising the sites to see in South Dakota. Though there are many sites to see, they wrecked the view of the traveling public in that particular instance. Again I think it goes back to rules and regulations. Commissioner Griffith said they were not maintaining status quo because we are setting policy for what we consider electronic billboard to be. So it really isn't status quo so any reference to status quo needs to be removed. Commissioner Winterburn said they were asking for policy to be set on those things and that will be new policy.

Commission Response: The Commission agrees that local control must be an integral part of any decision making process and believes the proper forum for establishing or allowing EBBs, at least on the highways, is the Legislature.

Comment No. 10: One comment was received stating modern technology has provided more effective ways to provide product information than EBBs without being so intrusive to the general public and the environment.

Commission Response: The Commission is not in a position to comment on whether there are other "more effective ways" to provide information than EBBs and takes no position in that regard. Also, see Response to Comment No. 3.

Comment No. 11: Thirteen comments were received stating current federal law (Highway Beautification Act) bans flashing, moving or intermittent lights, and EBBs could possibly allow an electronic application which flashed, moved, or change the message intermittently.

Commission Response: The Commission recognizes that a guidance letter from FHWA dated September 25, 2007, specifically states that digital or LED billboards, in the federal view, do not violate the laws referred to in the comment.

Comment No. 12: Three comments were received stating the Federal Highway Administration (FHWA) Memo allowing EBBs was issued without public input in violation of their own rule-making requirements.

Discussion: Commissioner Howlett said this was not the Commission's battle.

Commission Response: The Commission has no way of knowing whether or not the comment is accurate. It really makes no difference, given that the amendments prohibit EBBs.

Comment No. 13: Two comments were received stating FHWA is conducting its own research into safety issues associated with EBBs. Montana should wait until the study is complete in 2009, before considering allowing EBBs.

Discussion: Commissioner Winterburn said she felt it was a good idea to see what they come up with in terms of that study before we decide whether or not these billboards are safe. Commissioner Howlett said they don't know whether that is going to coincide with the Legislature, but somehow we've got to get through that period.

Commission Response: See Response to Comment No. 2. In addition, the Commission recognizes that currently FHWA's interpretation of the law does not prohibit LED or digital billboards.

Comment No. 14: Four comments were received stating two studies showing EBBs are not more likely to cause accidents are flawed.

Discussion: Commissioner Howlett said there is no scientific certainty on this issue.

Commission Response: See Response to Comment No. 2.

Comment No. 15: Three comments were received stating other states such as Vermont do not allow any type of billboards, yet their local businesses thrive because people like to visit these scenic places. Montana should not allow EBBs, which would send the wrong message about our natural beauty.

Discussion: Commissioner Espy said it was a state decision. That is the danger of going to the Legislature too by the way; you don't know what they might do.

Commission Response: The Commission acknowledges that Vermont, by law, does not allow billboards of any type. Whether or not there is any adverse economic impact in Vermont, however, is not supported or refuted by any evidence before the Commission.

Comment No. 16: One comment was received stating a ban on EBBs would attract more business to Montana, especially from those who yearn for nature and visual quietness.

Discussion: Commissioner Howlett said I truly don't know if somebody is going to come to Montana or not because of billboards. The point is there is no evidence to support or refute these comments.

Commission Response: There is no evidence available to the Commission to support or refute this comment.

Comment No. 17: Twenty-one comments were received stating Montana should not waste energy resources on advertising on the roadside. Banning EBBs would set a "green" example for other states. EBBs are huge energy consumers, over 15 times that of a regular static billboard with lighting.

Discussion: Commissioner Espy said with the price of electricity that may be an issue in the future. Commissioner Howlett said it amounts to the difference of opinion on whether you like billboards or you don't like them and whether they enhance or detract from the environment. Commissioner Winterburn said they saw no hard

evidence on how much would be saved in terms of “greening” by having an electronic billboard over a paper one, or how much energy it takes to generate that. There is no hard evidence on any of this. Commissioner Espy said it would be hard for them to do something like that because who is keeping track on how each billboard affects everybody and how much energy you are using?

Commission Response: The Commission acknowledges that there may be energy consumption associated with the use of EBBs, but has no evidence to support or refute the assertion. Also, see Response to Comment No. 3.

Comment No. 18: Five comments were received stating EBBs will clash with other historic or established architectural elements—even at a great distance.

Discussion: Commissioner Espy said that does deserve some merit; you don’t want some huge big sign at the Battle Field for instance. Commissioner Howlett said he didn’t think that comment no. 3 applied to this one. I would accept their comment as having validity. Commissioner Espy agreed.

Commission Response: The Commission accepts this comment as valid.

Comment No. 19: Nine comments were received stating if highways need to be widened or an EBB taken down for normal road improvements, the costs to communities will be huge because of required compensation to the sign owners.

Discussion: Commissioner Howlett said you have to pay for what you take and it doesn’t matter whether it is an electronic billboard or a house. Commissioner Winterburn said that it was not very expensive to dismantle one.

Commission Response: The Commission agrees that sign owners are generally entitled to compensation for taking related to highway expansion, and notes that the Interstate and Primary Highways are under the control of the Commission and not local government. The Commission and Department are always faced with the cost of acquiring improvements. There is no evidence that EBBs would be cumulatively more expensive.

Comment No. 20: One comment was received stating the proposed prohibition on EBBs will aid local communities in keeping the highway entrances to the city clear of bright, obtrusive billboard signs.

Discussion: Commissioner Howlett said that went back to comment no. 3 which essentially says there are differences of opinion on environmental impacts, some find them offensive and others don’t.

Commission Response: See Response to Comment No. 3.

Comment No. 21: One comment was received stating entities and special interest groups have argued the EBBs should be allowed as freedom of speech, but their freedom should not be imposed on the rest of the public in such a dramatic and imposing way.

Commission Response: Issues of freedom of speech are not at stake in this proposal. The limitation in these amendments does not prohibit existing advertising methods but restricts one alternative method not yet in place.

Comment No. 22: Two comments were received stating it would be a major change in Montana to allow EBBs, and that subject should perhaps not fall under an administrative rule change, but should perhaps be considered by the Legislature because there is such broad interest in this across the State.

Commission Response: The Commission agrees. The overall comments received by the Commission, both for and against the proposed amendments, recognize that the issue of EBBs on state highways under Commission jurisdiction has divided public opinion. As such, the Commission believes the final arbiter of this modern technological change ought to be the Legislature.

Comment No. 23: Three comments were received stating EBBs are not a mass media; there are much better ways to put out Amber Alerts that are already being taken advantage of such as radio and TV.

Discussion: Commission Espy noted that we already do Amber Alerts. That is near and dear to most people's hearts; they really like the Amber Alerts.

Commission Response: The Commission acknowledges that there are several existing means of posting alerts related to missing children and does not believe that the ability of using EBBs is, in itself, sufficient justification to alter the existing advertising practices.

Commissions Response to Opponent's Comments

Comment No. 24: There were 115 comments received, which related to the issue of the alleged impacts upon business or the economy, if the proposed action were taken. Essentially, the comments were to the effect that businesses (especially small businesses) need advertising in order to stay competitive, and that the proposed amendment would eliminate a possible medium for such advertising. Because of this, according to the comments, businesses could be put at an economic disadvantage.

Commission Response: The Commission recognizes that advertising is an important business practice. However, the Commission also notes that there are existing mediums that provide advertising options other than allowing EBBs. Also, see Response to Comment No. 22.

Comment No. 25: There were 32 comments received to the effect that roadside signs are an aid to travelers, especially those travelers seeking accommodations, such as lodging, restaurants and service stations. The comments stated that EBBs would increase the number of messages that could be displayed to the public, and thereby help the public find the type of services they were seeking.

Commissioner Response: The Commission acknowledges the benefits to travelers of roadside signage. The existing TODS and Logo sign programs, as well as other existing opportunities including OAC, provide this service now and have provided service for nearly 20 years. The Commission also notes these advertising mediums were legislatively enacted, and believes that if EBB advertising is to be introduced, it should be legislatively enacted as well.

Comment No. 26: There were ten comments received which pointed out that the allowed number of billboards has decreased in recent years, largely due to local controls. As a result, the possibility of using EBBs was attractive to the sign industry, because they could put more messages on fewer sign locations, thereby allowing fewer signs along the roads. Also, as a subset of this comment, a few comments stated that, because EBBs did not involve the necessity of physically changing the paper or vinyl every time the message was changed, there was less waste material when EBBs were used.

Commission Response: The Commission recognizes that the technology of EBBs may result in some savings, but believes the issue has statewide implications requiring a legislative opportunity for industry, commerce and local government to present their views in a forum which can enact statutory decisions.

Comment No. 27: There were 87 comments, which stressed the need to take advantage of the new technology afforded by the EBBs. Some of these comments also reiterated, as did the comments discussed in the previous paragraph, that the new technology would discourage the generation of waste material.

Commission Response: See Response to Comment No. 26.

Comment No. 28: There were 26 comments received, which pointed out that EBBs were an efficient way to provide public service announcements, such as Amber Alerts.

Discussion: Commissioner Espy said that had already been addressed.

Commission Response: See Response to Comment No. 23. The Commission acknowledges that there may be opportunities for public service announcements, but the Commission concludes that there are numerous existing mediums for that service now.

Comment No. 29: There were 25 comments received, wherein it was stated that EBBs did not create a distraction or safety hazard.

Discussion: Commission Winterburn said the Commission had already addressed that; there is no definitive study on that.

Commission Response: See Response to Comment No. 2.

Comment No. 30: There were twenty comments received, wherein it was stated that any proposal regarding EBBs should seek to regulate the EBBs rather than simply banning them.

Commission Response: The Commission believes that the change in OAC to allow EBBs is a significant alteration of the current practice and has significant impacts on industry, commerce, local government, and the environment, and should be addressed by the Legislature in the same manner as the TODS and Logo sign programs were.

Comment No. 31: There were four comments received to the effect that the notice of hearings did not comply with the Montana Administrative Procedures Act or that the proposal should be enacted through legislation rather than through rule making.

Commission Response: The Commission disagrees that MAPA was violated in any manner. The Commission agrees that the Legislature should consider the issue.

Comment No. 32: There were thirty-two comments received which expressed general opposition to the proposal without stating a specific reason.

Commission Response: The Commission recognizes that a number of individuals and entities oppose these amendments. Again, it is deemed the best course of action to maintain the status quo until the Legislature enacts controlling law.

Comment No. 33: There were nineteen comments received which asserted that the EBBs do not display intermittent, moving, or scrolling messages, but are static, and simply change a message every eight seconds or so. Many of these comments asserted that the EBBs have a “clean look.”

Commission Response: The Commission acknowledges that FHWA does not consider EBBs as violating the prohibition on intermittent, moving, or scrolling as set forth in federal regulations, but believes the technological differences of EBBs establish an entirely new medium that should be addressed by legislation in the same

manner as the TODS and Logo sign programs. It is acknowledged that different people have different opinions as to what is aesthetically pleasing.

The Department and the Commission acknowledge and thank those who took the time to make comments. We note that none of the comments were directed at the technical substance of the proposed rules but only to the impacts which are clearly in dispute on emotional or personal views on the use of the new technology.

Commission Howlett moved to adopt the comments and the summary statement proposed by Commission Winterburn. Commission Griffith seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

Regarding the Adoption of the Proposed Rule

Commission Winterburn moved to amend Sections ARM Sections 18.6.02 and 8.6.232 as noticed in the Administrative Register. Commission Griffith seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

Agenda Item No. 8 Additional Public Comment

Sara Busey addressed the Commission. She asked if the Commission just unanimously adopt the ban on electronic billboards. Commissioner Espy said yes. Sara Busey thanked the Commission for allowing her to attend the meeting by phone.

Paul Dennehy addressed the Commission: My name is Paul Dennehy, I'm with Lamar Advertising. I will be real brief since you've already made your decision. I would ask that you go back into the testimony of the three Hearings as well as the written comment to take a good look at the number of opponents and proponents of the amendment. I think you'll find the majority of the people were against the amendment being adopted as you just did. As Commissioner Howlett stated, you represent the people of Montana. The majority of the people at the Hearings were against the proposal. If you look at the three Hearings specifically, there were very few people there voting for the ban or speaking in favor of the ban. And the majority of the write-ins, both electronically and manually, were against. So I would like you to consider that.

You spoke of local authority – every permit for any outdoor advertising structure, whether it be electronic billboard or static, has to be signed off by the local municipality before the State will consider it. So it is already in place. The outdoor industry is heavily regulated by spacing, zoning, size, and we are regulated away from parks, churches, and I might add it is well done by MDT.

I'll speak loosely for the industry because I don't represent the industry as a whole, I represent Lamar. Lamar would be very willing to sit with MDT and discuss a middle ground and figure out what's best for the State, for regulation for the industry; we'd be more than willing to sit down and do that. We'd love the opportunity to do so, but we haven't had that opportunity. Thank you.

Commissioner Howlett said the industry is heavily regulated except on Reservations, at least on the Flathead, so when you say MDT, they don't do any regulation on Reservations. I want to direct this comment to Mr. Lynch. I will volunteer to help you visit with Tribal governments if you think that would be helpful to talk about this. I've spent a lot of years in and around Tribal government, and I'm of the

opinion that there is not a sense of how this can work or the fact that we could come to an Agreement about regulation because it is a very complicated issue depending upon the ownership of the land. We all could learn but I feel that in some places it is blighted. Maybe it is in the eye of the beholder, but when I can look at Flathead Lake or a big billboard, I'm going to choose to look at Flathead Lake. If I get to choose between the Mission Mountains or a big billboard, I'm going to choose to look at the Mission Mountains. So I want to encourage the Department to begin the discussions and talk about what might be possible and I don't know that that discussion has taken place. It never took place when I was on the Tribal Council. That has been some years ago. It never took place in the discussion of Hwy 93 and its reconstruction. I know that it is an issue with people who live there. So I just want to encourage the Department to think about how that can be approached and if you think it would be helpful, I know a lot of the people in Tribal government and I'd be willing to help you out. Director Lynch said that would be very helpful and MDT would be willing to do that. Paul Denney said he too would rather look at Flathead Lake or the Mission Mountains, and if that is an issue the industry can help with, we'd be more than willing to sit in and help with that also.

Commissioner Howlett asked Mr. Dennehy, due to the level of intensity of this issue, why didn't the industry bring it to the Legislature in the last session? It's been going on prior to the 2007 Session. Mr. Dennehy said he didn't have a good answer for that. There were several other businesses that were looking at it. We didn't go to the Legislature because we thought it would be handled through the permit process when we originally applied for it. As a result of that permit being turned down, there was not time after that to go to the Legislature.

Commissioner Winterburn asked Mr. Dennehy about the statement on their letterhead asking for multiple comments to be sent in. It says MDT is trying to prohibit digital sign boards and you ask people to write in. You also say if this amendment is adopted it could have an affect on your lease agreement so we're asking you to support these signs to be placed along our highway systems. Mr. Dennehy said that depending if the sign on the property is digital versus a static message, it might affect how a person is compensated for that. Commissioner Winterburn said it implies that they will loose the money that you pay them for the use of that land if they don't get on board and send in a comment. There are many, many, many comments that are duplicates of the same comment and all they had to do was sign their name and I'm just wondering if it wasn't supported by the advertising company? It was meant to state that if your property was a candidate for a digital sign and it is on the highway system, then it could affect the dollars you make for that lease if it is prohibited. Commissioner Winterburn said the way it was worded people would think they would loose their lease if they didn't do this.

Tim Reardon said they deal with Lamar Advertising in Oppositions and it has been a good working relationship; this is a good company. The lawsuit is adversarial, but that is what lawyers do; that is just business. Commissioner Griffith said that normally I appreciate your comments on the number of people who responded, but had I not seen 50 with Lamar's headline I might have taken that to issue. There was some point to Dee's suggestion that somebody put some heavy hands on the issue; that was that impression. Commissioner Espy said that does happen because in agriculture we have tried to bombard our Senators and Representatives at times and sometimes the only way to get people to comment is to get the card all ready for them and put the stamp on it and have them sign their name; so I understand.

Request from the Montana Beet Growers Association

Lori read the following letter from the Montana Beet Growers Association received by the Commission:

Commissioners:

Most of you recognize the Sugar Beet industry's economic contribution to the State of Montana. You may not be aware, however, of the narrow window of opportunity Sugar Beet producers have to deliver our crops to receiving stations at harvest. Weather is unpredictable and can be unforgiving as we witnessed in 2006 when over 4,500 acres of beets were left frozen in grower's fields resulting in millions of dollars in losses for every farmer. It is imperative the Sugar Beets are delivered in an efficient manner with every load delivered essential. Timing is everything. We average 25 days to complete harvest.

To this end we ask you to please support an increase of weight tolerance on state highways for farm vehicles transporting Sugar Beets during this critical harvesting period. Many growers deliver to the first point of unloading area receiving station within 10 miles of their fields with limited miles on state highways. Per Montana Code 61-10-144 the harvest tolerance is 20% for each axle. Thirty percent is more appropriate and current with modern equipment standards and capabilities. Your support of this necessary adjustment would eliminate delays, save precious fuel, and allow each farming operation to maximize each harvest day.

We appreciate your consideration of this matter and look forward to your replay.

Sincerely,

Greg Blackman, President
Montana State Beet Growers Association

Director Lynch said that is really an issue within the Department of Transportation. They do have a tolerance, but their tolerance is legislatively given to them and not by this Department. The tolerance was to allow them, with the uncertainty of how they could load their vehicle, to allow them to go the first time, to know what those beets weighed. Then they had to correct their loads after that. So now they are asking for 30%. This is a safety issue. This is also an equipment issue. Our responsibility is the safety of, not only the people driving those beet trucks, but the people on the roads who may also interact with those beet trucks. There is another option and another opportunity. This letter went to MCS also and they will review it to see what statutes apply. It may not be as simple as just saying yes. Commissioner Howlett said the agriculture industry, grain growers, beef producers and others who need to move their products to market, so in fairness to the entire industry it ought to be considered globally. The other thing that you didn't mention is added weight and added costs to roads from the impacts. Commissioner Griffith said the last issue, to me, is the most important, in that it's not a linear curve. When you go up 30% on weights, its toll on the road goes up fast. So it's not like 30% is just a little bit more, it's like twice as much and that is the problem – it's like the difference between one truck on the road with the equivalent of 10,000 cars. So that's my concern. Director Lynch said he would have to review the statute – I believe the 20% tolerance is for the first time without receiving a citation, then they are told what their weight is and then they need to correct it. I don't believe the statute allows them 20% for every time they haul beets out of the field to the elevator. We have tolerances by statute, a certain percentage per axle. It's really incidental but most trucks can reach maximum tolerance on a regular basis. Tolerance is really an increase in weight.

Rest Areas

Commissioner Howlett said he had received a letter from the people of Lima regarding rest areas. He asked if the Commission was going to receive a report on that. Director Lynch said they were analyzing all the rest areas right now; to see if they can use existing ones and looking at different types of sewers. At Lima, somehow it was miscommunication that they were not getting their rest area, but that's never been decided. Commissioner Howlett said the problem unique to Lima is when you have 50 trucks backed up, they literally only have two public bathrooms in town. Director Lynch said they understand that, and the intent is still to move forward with rest areas. We are looking at re-stoking those programs to make sure,

with the increase in costs, we can take advantage of property we already own and modern technology in sewer systems, so that we don't have to go through some exorbitant expense. We will have those proposals for you in the Red Book proposals. Jim Currie can report to you right now on some of the meetings he's had.

Deputy Director Currie said they were taking a re-look at the Rest Area Program with the same eye that we are with a lot of our projects, trying to make sure we get as much "bang for the buck" as we possibly can. I know we've talked in the past about changing our philosophy with rest areas – instead of building two of them on the Interstate we would build one at an interchange near a town and tie into the local utilities. I think we are backing off that a little bit given the fact that we have substantial investment in infrastructure where we currently have rest areas – the ramps, the curb and gutter, the lighting. Where appropriate, we will build rest areas in new locations, but first we are going to try and build on-location. For example at the Bearmouth Rest Area, we were looking at relocating that up the road but now we will build right where we are. Our problem with Bearmouth is the septic system, so we're exploring using a waste treatment system similar to what they use on cruise ships which handles 5,000 people per day. They are relatively reasonable in cost. The other thing we are looking at is instead of closing rest areas down and rebuilding them, we are working with Federal Highways to see if we can put together a program where we can actually use federal funding and instead of building a new rest area, going in and rehabilitating the existing rest area so that we're not totally building new infrastructure every time. We are looking at prioritizing rest areas on a statewide basis based on statewide needs rather than on a district level like we do now. We have not yet brought that prioritization to the Director yes but we will in the near future. Lima is on the list and is very much a priority for the Department. Lima is going to be a new rest area in a different location; it is going to actually be down at Lima and is on property currently owned by the Department. That will all be brought to you.

Commissioner Griffith asked if it would be ready by Red Book. Director Lynch said yes. He said the other thing they are looking at is the Governor's 20-by-10 Initiative to reduce the Department of Transportation's energy consumption by 20% by the year 2010. The rest areas play a part in that too. This is something the Department takes very seriously. We probably have 80% of the Department that understands that and we're still working on the other 20% that need to come on board. We believe in this Initiative and we are making effort toward that.

Agenda Item 3: Letting List & MCS Scale at Port of Raymond

Loran Frazier presented the proposed Letting Lists. We've included May and June and the one that was let today. We are looking at the future from July to December. Staff would recommend that you approve the proposed Letting List.

Commissioner Howlett moved to adopt the proposed Letting List. Commissioner Griffith seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

MCS Scale Site at the Port of Raymond

We received one bid on the Port of Raymond and that bid is 32% over our Engineer's estimate. The bid was received from Northern Improvement for \$782,028.50. Our estimate was \$592,645.55. It is outside guidelines for award; our guidelines for award on a project that size is 15%. We reviewed the bid and the only item we found that could be adjusted on our Engineer's estimate was crushed aggregate course. We increased our estimate by \$21,490.00 and that still leaves us

27% of our adjusted Engineer's estimate. It's not within guidelines for award. Based on that, we would recommend not awarding that project. The other item is that MCS is to be funded with a Federal Grant and I don't believe it is enough to cover this. So I would recommend not awarding this project.

Commissioner Griffith asked if the Grant would go away if it was not awarded. Director Lynch said it would not go away. We have started to look at the scope of this project and other ways to build this site. If we can't get bidders in that particular area, we may look to see what can be done at the state level. We will put the site in; the site will be in place by the end of September – at least the money will be obligated by then.

Commissioner Howlett moved to accept staff recommendations to not award for the Port of Raymond. Commissioner Griffith seconded the motion. All four Commissioners voted aye.

The motion passed unanimously.

Agenda Item 4: Certificates of Completion

Loran Frazier presented the Certificates of Completion for the months of March and April, 2008. Staff would recommend that you approve the Certificates of Completion.

Commissioner Griffith moved to approve the Certificates of Completion for March and April, 2008. Commissioner Skelton seconded the Motion. All four Commissioners voted aye.

The motion passed unanimous.

Agenda Item 5: Change Orders

Loran Frazier presented the Change Orders for March and April, 2008. Staff would recommend that you approve the Change Orders.

Commissioner Griffith moved to approve the Change Orders for March and April, 2008. Commissioner Skelton seconded the motion. All four Commissioners voted aye.

The motion passed unanimous.

Agenda Item 6: Liquidated Damages

Loran Frazier presented the Liquidate Damages. One is for the Ryegate West Project for two days at \$1,509.00 per day for a total of \$3,018.00. The contractor was given an opportunity to respond and chose not to.

No action was necessary.

Agenda Item 7: Commission Discussion

Outdoor Advertising Rules

Director Lynch said he had four items he wished to discuss with the Commission. One of them has to do with Outdoor Advertising. He gave the Commission a handed out of the proposed modification of the rules. As you can tell from the Outdoor Advertising meetings we just held, and from past Commission meetings over the last two years as well as this one, there really needs to be a clarification and clean up of language on the rules that were written in some cases over 30 years ago. MDT has met with all the parties and made some modifications to the rules which everybody seems to be in agreement with – the advertisers as well as the people who don't like the advertising. I've giving you a draft that goes through all the language changes we think need to take place on our rules. Tim Reardon said the process is the same – you have to publish a Notice with the Administrative Register. As Director Lynch has pointed out the Outdoor Advertising people have gone out and exhaustively talked to and provided copies to just about everybody they could think of – industry, private sector, environmental organizations, and they have all indicated they support the changes. Most of the changes are cleanup and organization and clarity and getting rid of some antiquated language. It's considered long overdue. So far everybody seems to like it. So we will need to get your approval to publish a Notice. We're giving you a chance to look these changes over and perhaps at the next Conference Call, if you don't have any problems with it, you can give us approval to file it with the Secretary of State. Director Lynch said he wanted to give the Commission an opportunity to look at the changes and ask any questions they may have. I want to look at it to make sure there are no rule changes; I've been told there are no rule changes here and it is basically language change. I've been told the industry supports it and all sides support it. Based on what's happened before, it is appropriate to give you an opportunity to look at them without being rushed to make a decision. If you agree or if you have questions we can address that through Commission Discussion or on the next Conference Call. I want to make sure when we ask you to go forward, we're all on the same page.

Commissioner Howlett asked if the changes cover the discussion about engaging the Tribal government. Director Lynch said they probably don't. Commissioner Howlett asked if this would be the time to include that. Director Lynch said he would like to talk to Legal about that. If we were to adopt rules that say we are to do something with Tribal government and we haven't met with them yet, then we might get into trouble. Commissioner Howlett felt it needed to be part of whatever rules we come up with.

Commissioner Espy said it was good to be addressing this. We certainly don't want to be in the position to let the Supreme Court decide what we're going to do on every law that we have. Director Lynch felt that no one misunderstood the rule on electronic variable message signs. I understand English and "no variable message signs" means just that and I'm a little disappointed in the Federal Highway Administration for saying it doesn't mean that; that caused a lot of problems. I understand Federal Highway's position on it, but it put states in a pretty tough spot. Commissioner Espy said the other side needs to consider the fact that Federal Highways is our partner and we have to work together. Commissioner Skelton mentioned that Lamar Advertising said they were willing to negotiate and help set policy, and that might be a nice opening for how the state approaches this. There is a big difference on whether the message changes in three seconds or ten seconds, or if you have four of them lined up. Kevin McLaury said that was what Federal Highways was trying to say; that technology by its definition does not violate the law. How you apply that technology, however, is what we need to deal with. Commissioner Griffith said no single issue has ever been affected by politics more than this issue and politics are going to change six months from now – whether it's

McCain or Obama and either one of them is likely to be more centrist than the current administration.

Scenic Byways

My second Item is Scenic Byways. As you know this Department and Nancy and Kevin were a part of writing up the Scenic Byways Rule and Regulations and how they apply. One thing we did not do was appoint people to the Scenic Byways Commission. That was brought to our attention in our last audit; that we need to do that. As you know we can have up to a maximum number of nine which is way too many. I just want to offer something for you to consider – since Scenic Byways in the State of Montana can only be on roadways that are 100% controlled by Federal money on both sides, it pretty well puts Scenic Byways on either National Forests or Reservations. We have five Transportation Commissioners that deal with a multi-billion dollar budget, and my suggestion to you is that we have a Scenic Byways group of three and two of them could come from this Commission. Two Commissioners can, by statute, be on that Commission. I think maybe even three of you could be, and I'll have to check with Tim to be sure. There might have to be somebody representing something other than what is currently being currently represented by this Commission so we may only be able to take two from the Commission. I can't see why you would need more than three; but that is your call. That is something for you to think about and we can discuss that at a future Commission meeting and follow through with the full legislative intent – to have a Scenic Highway Body. I will get you the other information about what we are required to do

MT 35

I would really like to thank Kevin. As you know we had two very successful public meetings on MT 35 which dealt with a lot of issues – not just the residents on MT 35 but the residents on Hwy 93 as well as the trucking industry and the Confederated Salish Kootenai Reservation which also owns land on both sides of the lake that both highways run through. Those meetings lasted a long time. They could have been contentious but they were not. I think the people who appeared at these meetings were polite and legitimately listened to each other very well. In both of these meetings Commissioner Howlett offered comment that was very well received. I just want to thank Kevin for attending the meetings and covering my back so to speak. He made some very good contributions at both of those meetings. We have agreed with these communities that we will continue to take comments up to July 7th. Then I'll review those comments and decide which direction MDT will go. In both Somers and Polson the consensus of the group was that we collectively, the residents of that area and MDT, have to come up with a solution that is acceptable to all parties. Otherwise someone is going to undo in the Legislature whatever we do. The Polson meeting was more Hwy 35 influenced than the north meeting but they were both very good meetings. So thank you Kevin. Commissioner Howlett said what he came away from the meetings with was people's sense that we really did listen and that we really will try to come up with a workable solution. That is the comment we made and it reinforces the position of the Department as one that tries to find solutions.

Testimony before Congressional Transportation Infrastructure Committee

Montana was selected out of five states to represent ... I had the opportunity and the honor to go to Washington D.C. and testify in front of the Transportation Infrastructure Committee connecting communities moving both people and freight. I offered testimony on behalf of South Dakota, North Dakota, Wyoming, Idaho and Montana in front of Chairman Oberstar's Committee and it went very well. There were a lot of positive comments and questions that came to me from the testimony I gave. MDT and rural America is really concerned, particularly our five states, about the next reauthorization because the focus seems to be congestion, congestion, congestion, freight corridors, ports, public-private partnerships where basically the

state sells their asset to a private entity and they would toll it and run it. That may have a place in certain states, but the rural perspective has been ignored or is not visible.

The North Dakota Director and myself testified in Minnesota. I also testified in Phoenix on a Congressional Commission representing those five states. Then I testified again in front of the Transportation Infrastructure Committee. So I believe we are getting our message out there and we need to keep it out there that this is a transportation system we are building in this country. If you were to look at a map, and if we are going to solve congestion and ports and freight movements, there is a big huge section of the United States that would have nothing as far as funding goes.

When you read that testimony, you will see some of the issue and some of the points that we made – and I think we made our point but we are going to have to keep the pressure up. I just wanted to let you know that I was in Washington D.C. testifying on behalf of, not only Montana, but four other states as well and we'll keep doing it through the reauthorization. Commissioner Howlett said they were feeling the affect of it on the airline side of things. To get across the State of Vermont it takes about \$.50 worth of diesel, to get across Montana it takes a bunch. So the affect of fuel compounds when it gets to Montana versus back east. So in addition to the funding issue, the travel issue gets to be a problem for Montana. It's going to be a struggle; it's a real struggle for me in Butte at the airport but it's going to roll down hill. And it's just not going to be Butte; it's going to be two or three cities in Washington, a couple in Idaho that will be affected by this. Out of the 435 airports nationwide, there could be as many as 100 with either one carrier or none. I mean it is that demonstrative.

Director Lynch said we just have to keep preaching it and not just to the choir. There have been three opportunities now that we've had at MDT to preach to others than the choir – the Commission in Minnesota, the Commission in Phoenix, and then before the T&I Committee. I have a feeling that based on our testimony and the questions they asked of me, I'm probably going to be back to give more testimony. I think they were very appreciative of what we offered. I give Sandy Straehl a lot of credit; she helped with an awful lot of the information. We've got a good story to tell and I'm very fortunate that I get to work for a Department with people who have the knowledge and the expertise to know how to tell that story. She made me look good in D.C. So we are going to keep doing it; we have to keep doing it. Congressman Oberstar actually used some of our testimony in speaking before a national group and he gave us credit for some of the information that he used. With all the people testifying, he pulled stuff out of our testimony to use. Oberstar is one of the Congressman involved in federal funding, obviously Baucus is the star for federal funding in this country, not just Montana but the whole country. But on the Congressional side, Oberstar is right there with him. He is the one who stood up and said we need a \$500 billion highway plan, not a \$198 billion highway plan. So he gets it.

Commissioner Espy said all the presidential candidates seem to understand about the gas tax; apparently they don't understand what it does. One narrator asked someone if they agreed that they should take off the gas tax, and they said yes absolutely. Then someone else asked if they'd be willing to drive on bumpy roads and they said they didn't care, they'd drive on bumpy roads. No they won't! Who are they kidding!

Agenda Item 8: Next Commission Meeting

Conference Call on July 9, 2008. Regular Meeting on September 25, 2008.

Adjourned:

Commissioner Espy adjourned the meeting

Commissioner Espy, Acting Chair
Montana Transportation Commission

Jim Lynch, Director
Montana Department of Transportation

Lori K. Ryan, Secretary
Montana Transportation Commission